

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In re ENRON CORPORATION
SECURITIES LITIGATION

§
§

United States Courts
Southern District of Texas
FILED

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Michael N. Milby, Clerk

This Document Relates To:

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MARK NEWBY, et al., individually and
on behalf of all others similarly situated,

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§
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Plaintiffs,

§
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vs.

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ENRON CORP., et al.,

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§

Defendants.

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Civil Action No. H-01-3624
(Consolidated)

THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA, et al., individually and
on behalf of all others similarly situated,

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Plaintiffs,

§
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vs.

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KENNETH LAY, et al.,

§
§

Defendants.

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§

**REPLY OF DEFENDANT CIBC WORLD MARKETS PLC
IN SUPPORT OF ITS MOTION TO DISMISS THE
FIRST AMENDED CONSOLIDATED COMPLAINT**

**I. Plaintiffs Fail to State a Claim Against CIBC World Markets plc Under
Section 10(b).**

Plaintiffs point to no allegations giving rise to a strong inference that CIBC World Markets plc, as a distinct entity, acted with scienter. Plaintiffs simply lump CIBC World Markets plc together with its parent and sister corporations under the group moniker "CIBC,"

treating them as a single actor.¹ (First Amended Consolidated Complaint [“Complaint”] ¶ 103(a); Opposition at 1) Plaintiffs’ argument seems to be that actions by one CIBC affiliate purportedly showing its scienter are enough to infer scienter on the part of any affiliate in the CIBC corporate family. This kind of undifferentiated pleading does not satisfy the heightened requirements of the Private Securities Litigation Reform Act. Plaintiffs must allege specific conduct by CIBC World Markets plc showing that it acted with scienter.

A. The Complaint Does Not Identify CIBC World Markets plc As A Defendant in Count I.

Plaintiffs’ First Claim for Relief (Count I) identifies 48 separate defendants, one of which is a composite fiction that plaintiffs refer to as “CIBC.” Paragraph 103(a) of the Complaint defines “CIBC” as a collective term that includes the parent corporation, Canadian Imperial Bank of Commerce, together with its

“ . . . known and unknown subsidiaries, divisions and/or affiliates acting as the agent of Canadian Imperial Bank of Commerce, such as, but not limited to CIBC Inc., CIBC World Markets Corp., CIBC World Markets plc, CIBC Capital Corp. and CIBC Oppenheimer Corp. (collectively, “CIBC”). . . ” (emphasis added)

According to plaintiffs, by referring back to paragraph 103(a) of the Complaint the reader can divine that Count I’s reference to “CIBC” is intended to identify CIBC World Markets plc as a defendant in Count I. (Opposition at 1) That logic would lead to the conclusion that a number of “unknown subsidiaries, divisions and/or affiliates” of Canadian Imperial Bank of Commerce are also defendants in Count I. Count I does not identify CIBC World Markets plc as a

¹ Defendant CIBC World Markets plc is a London-based subsidiary of defendant Canadian Imperial Bank of Commerce (“CIBC”). It was first named as a defendant in plaintiffs First Amended Consolidated Complaint (the “Complaint”). Upon accepting service of process, CIBC World Markets plc joined in the Motion to Dismiss that had been filed by its parent and sister corporations, CIBC and CIBC World Markets Corp. (Docket Entry #1505) That Motion has been briefed fully, and this Reply will not repeat arguments addressed more fully in those briefs.

defendant by name, and plaintiffs do not give CIBC World Markets plc fair notice that it is an intended target of Count I.

B. Count I Alleges No Conduct By CIBC World Markets plc That Is Actionable Under Section 10(b).

Plaintiffs' failure to identify CIBC World Markets plc as a defendant in Count I is emblematic of a more fundamental inadequacy in plaintiffs' Section 10(b) claim: plaintiffs allege no facts showing that CIBC World Markets plc acted with scienter. As Plaintiffs' Opposition acknowledges, the following are the only allegations that purport to tie CIBC World Markets plc to the larger scheme that allegedly defrauded purchases of Enron's publicly traded securities:

“CIBC World Markets plc—under the control of Canadian Imperial Bank of Commerce—acted . . . to further the defendants fraudulent scheme by acting as the initial purchaser in the Marlin II, Marlin Water Corp. II 7/12/01 6.19% Senior Secured Notes due 03.”

(Complaint ¶ 103(c)) (Opposition at 1-2) The Marlin Notes offerings are the subject of the Section 12(a)(2) claims presented in Count IV, discussed in Part II of this Reply.

Plaintiffs argue that CIBC World Markets plc's purchase and private re-sale of approximately \$1 billion in foreign notes in June 2001 provides a sufficient basis for inferring scienter under Section 10(b) with respect to claims arising out of plaintiffs' purchases of Enron's publicly traded securities. Plaintiffs highlight the Complaint's allegation that “Enron's need for cash made access to capital markets a crucial element of keeping the Ponzi scheme going.” They argue that “this Court has already determined that Lead Plaintiff's allegations as to this part of the scheme properly state a claim.” Opposition at 2 (*citing In re Enron Corp. Sec. Lit.*, 235 F.Supp.2d 549, 613, 702 (S.D. Tex. 2002).

Plaintiffs misread this Court’s opinion. The Court made it clear that certain specific allegations in the Complaint—none of which involved CIBC World Markets plc—provided the basis upon which this Court concluded (over CIBC’s objection) that plaintiffs had pled facts from which scienter could be inferred on the part of CIBC: “Lead Plaintiff makes specific assertions against CIBC, that, if true, would constitute primary violations of § 10(b) and Rule 10b-5 and give rise to a strong inference of scienter.” *Id.* at 701. Helping Enron affiliates to raise capital through private placement Note offerings is not among the “specific assertions” listed by this Court. The transactions listed in this Court’s discussion of CIBC’s scienter were off-balance-sheet transactions involving limited partnerships and SPEs such as LJM2 and Hawaii 125-0, as well as transactions involving New Power, Project Braveheart and the Blockbuster video-on-demand venture. *Id.* at 701-02. Neither the Complaint nor plaintiffs’ Opposition explains how CIBC World Markets plc’s role as an initial purchaser of Marlin Notes connects it with any of those transactions. And nothing in the Court’s Opinion suggests that a strong inference of scienter arises whenever there are allegations that a CIBC-affiliate participated in a private Note offering that provided an Enron-affiliate with “access to capital markets.” (Opposition at 2)

The PSLRA requires particularity. Plaintiffs cannot state a Section 10(b) claim against a distinct corporate entity like CIBC World Markets plc by treating all corporate affiliates of CIBC as an undifferentiated composite called “CIBC” and arguing that each affiliate automatically shares the purported scienter of the others. Plaintiffs allege only one instance of specific conduct by CIBC World Markets plc—that it acted as the initial purchaser of certain foreign notes—and plaintiffs offer nothing to explain how its initial purchase of the Marlin Notes operated as a fraud or deceit upon the purchasers of Enron’s publicly traded stock.

II. The Complaint Fails to State a Section 12(a)(2) Claim Against CIBC World Markets plc.

A. Plaintiffs Lack Standing to Assert Section 12(a)(2) Claims With Respect to the Marlin Notes.

Only actual purchasers of the Marlin Notes qualify as members of a proposed class of Marlin Note purchasers. No named plaintiff purchased any of the Marlin Notes. Accordingly, none of the named plaintiffs has standing to sue under Section 12(a)(2) for alleged misstatements made in connection with the sale of those Notes. The Section 12(a)(2) claims arising out of the sale of the Marlin Notes fail because they lack a plaintiff. This issue has been fully briefed by the parties and is awaiting the Court's decision. (Docket Entry #1505, and 1602)

Plaintiffs' Opposition adds a new but erroneous argument. Plaintiffs argue that the purchasers of Marlin Notes *are* represented by an "actual" purchaser of those Notes. They argue that on August 27, 2003, a new party—Imperial County Employees Retirement System ("ICERS")—filed a motion to intervene in this litigation. ICERS apparently will allege—if it is permitted to intervene—that it purchased Marlin Notes on July 12, 2001. However, at this point ICERS has *not* been permitted to intervene. CIBC World Markets plc and numerous other defendants have opposed ICER's motion to intervene, and they have done so for a number of reasons—not the least of which is the fact that ICERS first attempted to join this litigation *after* the statute of limitations had run with respect to any claims it might assert arising out of its alleged purchase of Marlin Notes. (See e.g., Docket Entry #1719) Thus, it is false for plaintiffs to suggest that ICERS is already a party to this litigation, or that ICERS's unapproved motion to intervene somehow cures the existing Complaint's failure to name a single purchaser of Marlin Notes as a plaintiff.

Plaintiffs are also wrong when they suggest that this Court's prior rulings concerning who should act as Lead Plaintiff may be construed as rulings that the currently-named plaintiffs

(none of which purchased Marlin Notes) are entitled to assert claims on behalf of the purchasers of Marlin Notes. Plaintiffs rely on the following language from this Court’s decision appointing the Regents of the University of California as Lead Plaintiff: “[A] class of plaintiffs who purchased different types of securities may properly be certified with a representative party who only purchased one type of security.” *In re Enron Corp. Sec. Lit.* 206 F.R.D. 427, 445 (S.D. Tex. 2002) (quoting *Endo v. Albertine*, 147 F.R.D. 164, 167 (N.D. Ill. 1993)). However, this Court’s decision was concerned with who should act as Lead Plaintiff and whether there should be multiple unrelated lead plaintiffs. The Court concluded that it was appropriate for a single Lead Plaintiff and its counsel to represent multiple proposed classes composed of purchasers of different types of securities, even though the Lead Plaintiff did not purchase all of the identified types of securities. Nothing in the Court’s decision suggested that it is appropriate for a representative party to act on behalf of a class of purchasers of a particular kind of Note where *no* plaintiff named in the entire litigation purchased the particular kind of Note at issue.

Finally, since none of the named plaintiffs purchased Marlin Notes, it goes without saying that plaintiffs do not allege that any particular plaintiff purchased Marlin Notes directly from CIBC World Markets plc, or that any plaintiff made such a purchase after being solicited by CIBC World Markets plc. The absence of those allegations is fatal to any Section 12(a)(2) claim against CIBC World Markets plc.

B. Plaintiffs’ Section 12(a)(2) Claim is Barred by the One Year Statute of Limitations.

CIBC and CIBC World Markets Corp. have briefed the statute of limitations issue fully. (Docket Entry #1505 and 1602) Plaintiffs’ Opposition here adds only one new argument—an argument that does not withstand the slightest scrutiny. Plaintiffs state:

“CIBC [World Markets] plc’s involvement in the fraud was only recently disclosed by the filing of the First Amended Complaint.

Previously, CIBC [World Markets] plc's role remained substantially hidden from the media and investors. Thus, CIBC [World Markets] plc does not (and cannot) establish that a reasonable investor was put on notice of the asserted claims against CIBC plc prior to May 14, 2003.” (Opposition at 4)

This statement displays almost deliberate blindness to the briefing that has already taken place on this issue. Specifically, CIBC and CIBC World Markets Corp. have shown the following: (1) plaintiffs were informed of the discrete roles played by various CIBC affiliates when CIBC filed its Motion to Dismiss on May 8, 2002 (Docket Entry #615); (2) CIBC's Motion presented case law showing that plaintiffs could not assume, without specifying why, that CIBC could be held responsible for conduct allegedly engaged in by its subsidiaries; (3) when confronted with these facts and cases, plaintiffs made a deliberate tactical decision *not* to amend their pleadings to identify the various CIBC subsidiaries that actually engaged in much of the challenged conduct; (4) instead, plaintiffs stubbornly stood on their original pleadings—pleadings that named only CIBC—for more than a year after CIBC itself identified the particular roles of its various subsidiaries; and (5) plaintiffs finally repented of their tactical decision, but they did so too late. They tried to add subsidiaries such as CIBC World Markets plc as defendants more than a year after plaintiffs were formally notified of the roles of those subsidiaries.

Given the information and arguments set forth in CIBC's May 8, 2002 Motion, only willful denial could allow plaintiffs to state that they were not aware of the need to assert claims against CIBC World Markets plc prior to May 14, 2003.

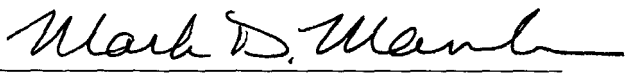
Plaintiffs' purported inability to identify CIBC World markets plc as a defendant prior to the expiration of the statute of limitations is tied directly to its failure to name an actual purchaser of the Marlin Notes as a plaintiff. The statute of limitations begins to run when the plaintiff knows or should have known of a violation. Section 12(a)(2) gives a plaintiff a remedy

only against his immediate seller or someone who solicited the sale. An *actual* purchaser of the Marlin Notes would have had no trouble identifying the proper defendant if indeed CIBC World Markets plc sold the Marlin Notes to the purchaser or solicited the purchase.

Conclusion

For the foregoing reasons, CIBC World Markets plc urges the Court to dismiss all claims made against CIBC World Markets plc in the First Amended Consolidated Complaint.

Respectfully submitted

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CERTIFICATE OF SERVICE

I certify that on October 29, 2003, true and correct copies of Defendant CIBC World Markets plc's Motion to Dismiss the First Amended Consolidated Complaint and Memorandum of Law in Support, and the proposed Order, have been served upon all counsel of record in accordance with the Order Regarding Service of Papers and Notice of Hearings entered on April 10, 2002.



Mark D. Manela